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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91162780
Party	Defendant KEITH CANGIARELLA
Correspondence Address	KEITH CANGIARELLA 331 N. HARRINGTON DRIVE FULLERTON, CA 92831 UNITED STATES 1mib@dreamweaverstudios.com, kccandrgn@sbcglobal.net
Submission	Motion to Strike
Filer's Name	Keith Cangiarella
Filer's e-mail	mib@sosrescueme.com
Signature	/Keith Cangiarella/
Date	07/13/2008
Attachments	ttab reply to opposition to motion to strike july 11.pdf (18 pages)(605253 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application Serial No.: 78/229,875 Mark: MESSAGE IN A BOTTLE	Opposition No. 91162780 Cancellation No. _____
MESSAGE IN A BOTTLE, INC, a California corporation, Opposer, v. KEITH CANGIARELLA, Applicant.	

In the Matter of Trademark Registration No.: 2,243,269 Mark: MESSAGE IN A BOTTLE	
KEITH CANGIARELLA, Petitioner, v. MESSAGE IN A BOTTLE, INC, Opposer	

Patent and Trademark Office

Trademark Trial and Appeal Board

P.O. Box 1451

Alexandria, VA. 22313-1451

APPLICANT’S REPLY TO OPPOSER MESSAGE IN A BOTTLE, INC’S REPLY
TO MOTION TO STRIKE APPLICANT’S NOTICE OF RELIANCE

Let it Be Known, APPLICANT, KEITH CANGIARELLA (“Applicant”) hereby replies Opposer’s reply to the motion to strike the Applicant’s Declaration of Keith Cangiarella (“Declaration”).

1. Opposer’s reply should be dismissed since the TMEP (TRADEMARK MANUAL OF EXAMINATION PROCEDURES) nor does § 703.01(b) does not exist in the TMEP, the TMEP chapter 703 is Office Does Not Issue Duplicate Registrations. This has no bearing on this case and this reply should be given no merit, and should be dismissed.

2. Since the applicant is one whom prides himself on due diligence and wishes to save the Board time, in case point 1 is not considered. The Applicant waited five business days to see if Mr. Smith, would advise the Board of his error but he did not. Mr. Smith should have stated was TBMP § 703.1(b)
Stipulations. If the parties so stipulate in writing, depositions may be taken before any person authorized to administer oaths, at any place, upon any notice, and in any manner, and when so taken may be used like other depositions. By written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or witnesses. The parties may stipulate in writing what a particular witness would testify to if called, or the facts in the case of any party may be stipulated in writing.
3. On January 30, 2006, Keith Cangiarella, via former counsel put forth a Declaration attached here to. On February 9, 2006 Mr. Smith presented to the Board, Opposition to Opposer's Motion to Reopen Discovery Period and Extend Trial Schedule – Date 02-09-2006 page 1-2 "Applicant's counsel has again displayed an apparent desire to make a simple matter seem like a complex one, filing a verbose and unwieldy diatribe in an effort to obfuscate the simple and adequate bases for Opposer's motion to reopen discovery. Applicant's counsel even attaches an irrelevant and *self-serving declaration* from the Applicant himself, Keith Cangiarella, which can have no purpose other than to attempt to prejudice the record by *presenting premature testimony* to the TTAB before of Applicant's scheduled period for so." (*emphasis added*), see attached. The Opposer has already stipulated that a declaration is testimony and a stipulation is already on the record.
4. A Declaration is the only method of presenting testimony by an individual acting pro se and is allowable per 37 CFR 1.68 – Declaration in lieu of Oath.
5. The Board nor Opposer's counsel would expect the Applicant to question himself!, via oral testimony?
6. The only method put in testimony is via a Declaration for one acting pro se.

Further, TBMP § 703.1(b)

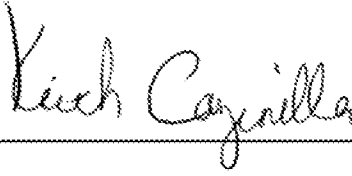
Stipulations. If the parties so stipulate in writing, depositions may be taken before any person authorized to administer oaths, at any place, upon any notice, and in any manner, and when so taken may be used like other depositions. By written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or witnesses. The parties may stipulate in writing what a particular witness would testify to if called, or the facts in the case of any party may be stipulated in writing.

Is bias, unfair and prejudiced to parties acting pro se. This stipulation gives the party acting with counsel an unfair advantage over a party acting pro se. As a party acting pro se can only put certain evidence before the Board via a Notice of Reliance. A party acting pro se is at the mercy of the other party when a stipulation is required in writing to able to put forth evidence and testimony via a declaration. This allows the other party to block important evidence from being presented to the Board, which in turn gives the other party an unfair advantage, and not allowing the Board to see both sides of the arguments.

Further, Mr. Smith is harassing the Applicant and trying to make the Applicant go to additional expenses when he knows full well that the testimony will be the same no matter how it is introduced.

Finally, for the above reasons the Opposer's Motion to Strike and and Reply to the Applicant's Opposition to Opposer's Motion to Strike should be dismissed as a stipulation has already been presented by Mr. Smith himself, and for the above reasons as well.

Dated : July 11, 2008



KEITH CANGIARELLA

“Pro Se”

331 N. Harrington Dr

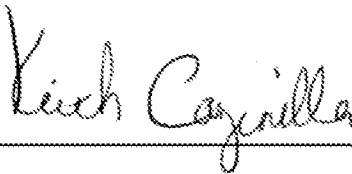
Fullerton, CA. 92831

Certificate of Service

I hereby certify that a copy of the foregoing APPLICANT’S REPLY TO
OPPOSER MESSAGE IN A BOTTLE, INC’S REPLY TO MOTION TO STRIKE
APPLICANT’S NOTICE OF RELIANCE

was first class mailed to Mr. Peter H. Smith Attorney at law, 1535 J Street, Suite A.,
Modesto, CA. 95353.

Date July 11, 2008



Keith Cangiarella

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application Serial No.: 78/229875 Mark: MESSAGE IN A BOTTLE GOLD SHELLS, INC., a California corporation, Opposer, v. CANGIARELLA, KEITH Applicant.	Opposition No. 91162780 APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO REOPEN DISCOVERY PERIOD AND EXTEND TRIAL SCHEDULE
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Applicant KEITH CANGIARELLA (hereafter "Applicant") through counsel, hereby opposes Opposer's GOLD SHELLS, INC. (hereafter "Opposer")'s Motion to Reopen Discovery Period and Extend Trial Schedule as was served by mail on the Applicant dated January 12, 2006, and apparently filed with the Board on or about January 23, 2006.

I. INTRODUCTORY STATEMENT

Without proffering any declarations, proposed interrogatories nor even any cognizable basis for its latest unwarranted, untimely or otherwise belated motion;

Without identifying what discovery it was seeking or how such discovery might warrant a complete "do over"¹ resetting the entire discovery period in this action; and

After recently having been found by the Board of several violations of the Trademark Rules, including Rule 2.120(d)(1) (abusive discovery requests – serving interrogatories in excess of the seventy-five permitted)²; and Rule 2.120(e) (duty to make a good faith effort to resolve discovery disputes prior to seeking Board intervention.)³ yet avoiding any sanction therefor, and, rather obtaining unexpected relief, (after the Board sua sponte, on January 3, 2006, reopened and extended Opposer's testimonial period (for the plaintiff in the Opposition) for another ninety days – from December 29, 2005 to February 28, 2006;

¹ To make up for the acts that one is reasonably expected to timely perform in an Opposition proceeding in which it had initiated in July 2004)

² Board's Order Denying Opposer's Motion To Compel dated January 3, 2006 p.2

³ Board's Order Denying Opposer's Motion To Compel dated January 3, 2006 p.3

otherwise meet and confer in any manner whatsoever with Applicant, or the undersigned counsel prior to filing the instant motion.

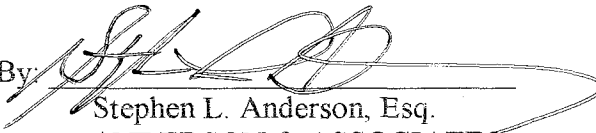
IV. CONCLUSION

According to TBMP Section 509.01(a): "If a motion to extend the time for taking action is denied, the time for taking such action may remain as previously set." (Citing: *Trademark Rules* 2.120(a) (discovery period); 2.121(a)(1) (testimony period); see also *Fairline Boats plc v. New Howmar Boats Corp.*, *supra* at 1479; *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, *supra*; *Luemme Inc. v. D.B. Plus Inc.*, *supra*; and *Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc.*, *supra* at 1544 (**petitioner's testimony period consequently expired where motion to extend testimony period was denied and dates were left as originally set**)).

When considering the totality of the circumstances herein, Opposer's Motion to Reopen Discovery Period And Extend Trial Schedule, must be denied as a matter of law and all dates set previously should remain.

Indeed, even if the Board were to wait until after February 28, 2006 to properly deny the Opposer's motion to extend trial dates, under the circumstances, and based on the clear authorities cited herein and readily available in the TBMP, such a result would neither be harsh, nor unreasonable in this action.

Dated: January 30, 2006

By: 
Stephen L. Anderson, Esq.
ANDERSON & ASSOCIATES
32605 Highway 79 South,
Suite # 208
Temecula, CA 92592

Certificate of Service

I hereby certify that on January 30, 2006 a copy of the foregoing **APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO REOPEN DISCOVERY PERIOD AND EXTEND TRIAL SCHEDULE** was mailed first-class mail, postage prepaid, to Peter H. Smith, Attorney at law, 1535 J Street, Suite A, Post Office Box 1867, Modesto, California, 95353, attorney for Registrant. I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 30, 2006


Kristina K. Harrell

**DECLARATION OF KEITH CANGIARELLA IN OPPOSITION TO MOTION
TO REOPEN DISCOVERY PERIOD AND EXTEND TRIAL**

1. I am the Applicant and the owner of Trademark Application Serial No. 78/229875 for the mark MESSAGE IN A BOTTLE. I am over the age of 18 and, if called, I would competently testify to the following:
2. Since at least as early as March 10, 1998, I have used the mark MESSAGE IN A BOTTLE in United States commerce as related to my goods and services, particularly including, without limitation: novelty, favor, and souvenir bottle containing messages and greetings, invitations, promotional materials of others, and advertising materials of others; kits comprised of bottles, paper for creating promotional messages, advertising messages, greetings, messages and invitations and packaging and boxes for mailing in International Trademark Class 016.
3. I am also the owner of California State Service Mark Registration No. 059960 for the mark MESSAGE IN A BOTTLE which I have used in connection with the:
“[m]anufacturing and shipping a novelty, favor, souvenir bottle containing messages and greetings, invitations, promotional materials of others and advertising materials of others” continuously in the State of California since at least as early as June 01, 1998. A true copy of such certificate of registration as was duly issued on November 30, 2004 by the California Secretary of State is attached hereto as Exhibit “A”.
4. For several years, and at all times relative to this proceeding, I have utilized the Internet to host a website offering the branded goods and services as are described above. As the primary method to attract prospective consumers to my website, at all times relevant to this proceeding, I have utilized “pay-per-click” keyword bidding so that if an Internet user types my trademark MESSAGE IN A BOTTLE into nearly every major search engine (particularly including Yahoo, Google & MSN) then my website, trademark and product descriptions would be prominently listed among the top three “hits” or search results.

5. Such keyword bidding specifically resulted in a significant increase in web traffic to my website, consumer recognition of my MESSAGE IN A BOTTLE trademarked products and indeed led to a significant number of sales and prospective sales of my branded goods and services. For example, attached hereto as Exhibit "B" is a true copy of the first page of my "Client Activity Report" from Overture (now known as Yahoo Search Marketing) which shows that during the month of March 2003, my bids on the three keywords: "message in the bottle;" "message in a bottle invitation" and "message in a bottle gift" resulted in more than five thousand internet users seeing my web address, product name and description, and at least 407 new visitors and prospective customers being directed to my website during that one month, from that one (Overture) search system alone.
6. Shortly after this Opposition proceeding was initiated by Opposer and/or its alleged predecessor, I was advised from Overture that as a result of a complaint re: threatened litigation (by Opposer GOLD SHELLS INC. and its predecessor Roger Rojas) they were discontinuing my right to bid on any keywords that contained the term MESSAGE IN A BOTTLE and/or any other related keywords
7. Despite having responded to Overture by way of providing information and evidence to the effect that:
 - (a) My Application for the mark MESSAGE IN A BOTTLE was approved for publication only after USPTO Examining Attorney Kelley L. Wells, reported having "...searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02;"
 - (b) I am entitled to all of the rights afforded by the Certificate of Registration of Servicemark granted to me by the State of California (Exhibit "A") for the mark MESSAGE IN A BOTTLE in connection with the services listed thereon;
 - (c) That Opposer, Gold Shells, Inc. owns no trademark registrations as related to any goods in International Class 016;

(d) That I am informed and believe that Opposer has been guilty of fraud by misrepresenting the nature of its goods and services offered, and/or the nature of the “telecommunications services” alleged in International Class 038 that it and its predecessor have claimed as a matter of record before the USPTO.

8. Notwithstanding my efforts and correspondence with Overture and its attorneys, throughout the duration of these proceedings, my business has been substantially harmed as they and their successor, Yahoo Search Marketing have repeatedly refused to permit me to engage in any keyword advertising with respect to the phrase “message in a bottle” or any related derivative.

9. For example, on June 17, 2005, I received a letter from attorney Howard S. Michael which stated:

“I have been asked by Yahoo! Search Marketing (formerly Overture Services, Inc.) to respond to your June 9th email, which I have reproduced below. As we have explained to you in the past, we have reviewed the applicable records and determined that Golden Shells, Inc. owns a federal registration for ‘message in a bottle’ for use in connection with services that are similar to the services you are currently providing on the www.bottlemeamessage.com web site. Accordingly, pursuant to its guidelines, Yahoo! Search Marketing will not accept your bid for the phrase ‘message in a bottle.’

We understand that you and Golden Shells are currently engaged in proceedings before the Trademark Trial and Appeals Board regarding the phrase ‘message in a bottle.’ Please feel free to contact Yahoo! Search Marketing again in the event you succeed in your case against Golden Shells.

10. As the direct result of delay caused in these proceedings my website has received substantially reduced traffic and my business has suffered a significant resulting loss of prospective sales.

11. Further delays will only cause me to incur additional legal fees and costs associated with this action, uncertainty, as well as significant and continued business delays, harm and disruption.


12. Finally the cost associated with the defense of my application in this proceeding have substantially increased quite surprisingly from my original expectations. I therefore

oppose the general notion of further delays herein as I am informed and believe that the Opposer and its counsel have already been the direct cause of repeated acts of erroneous and/or dilatory conduct associated with these proceedings, which are indicated by the notation of an asterisk next to the date in the attached

TIMELINE OF TTAB PROCEEDINGS RELEVANT TO THIS MOTION

13. I hereby attest under penalty of perjury as to the foregoing.

DATED: January 26, 2006



KEITH CANGIARELLA
Applicant


Certificate of Service

I hereby certify that on January 30, 2006 a copy of the foregoing


**DECLARATION OF KEITH CANGIARELLA IN SUPPORT OF
APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO
REOPEN DISCOVERY PERIOD AND EXTEND TRIAL SCHEDULE**

was mailed first-class mail, postage prepaid, to Peter H. Smith, Attorney at law, 1535 J Street, Suite A, Post Office Box 1867, Modesto, California, 95353, attorney for Registrant.

Dated: January 30, 2006


Kristina Harrell

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

<p>In the Matter of Trademark Application Serial No. 78/229,875 Mark: MESSAGE IN A BOTTLE</p> <p>GOLD SHELLS, INC., a California corporation, Opposer,</p> <p>v. KEITH CANGIARELLA, Applicant.</p> <p>-----</p> <p>In the Matter of Trademark Registration No. 2,243,269 Mark: MESSAGE IN A BOTTLE</p> <p>KEITH CANGIARELLA, Petitioner,</p> <p>v. ROGER ROJAS, Respondent.</p>	<p>Opposition No. 91162780 and Counterclaim for Cancellation</p> <p></p> <p>02-09-2006 Patent & TMO/TM Mail Rcpt Dt. #30</p>
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**REPLY TO APPLICANT'S OPPOSITION TO OPPOSER'S
MOTION TO REOPEN DISCOVERY PERIOD AND
EXTEND TRIAL SCHEDULE**

Opposer Gold Shells, Inc., hereby replies to Applicant's Opposition to Opposer's Motion to Reopen Discovery Period and Extend Trial Schedule, a copy of which was served by mail on Opposer on January 30, 2006.

Applicant's counsel has again displayed an apparent desire to make a simple matter seem like a complex one, filing a verbose and unwieldy diatribe in an effort

to obfuscate the simple and adequate bases for Opposer's motion to reopen discovery. Applicant's counsel even attaches an irrelevant and self-serving declaration from the Applicant himself, Keith Cangiarella, which can have no purpose other than to attempt to prejudice the record by presenting premature testimony to the TTAB before of Applicant's scheduled period for doing so.

Opposer submits that its motion provides sufficient grounds for the TTAB to grant the motion, but Opposer wishes to make the following points in rebuttal to Applicant's opposition:

1. There is a need for reopening the discovery period. While Opposer has received some documents in discovery, and some answers to Opposer's request for admissions, Opposer has a right to receive from Applicant answers to basic questions about Applicant's business so as to be able to compare Applicant's goods and services with the services recited in Opposer's registration for the same mark.
2. Every document filed by Opposer in this proceeding has been timely filed, despite Applicant's counsel's attempt to make it seem otherwise.
3. Applicant's counsel attempts to prejudice the TTAB against Opposer by citing "a past history of dilatory and repeatedly neglectful conduct," but there is absolutely nothing in the record (or in the facts outside of the record) to support this inflammatory allegation.

4. The basis for Opposer's claim of "excusable neglect" is specific. Under the TTAB's rules, and the schedule in this proceeding, Opposer's motion to compel discovery was timely even though the discovery period had already closed. The record already contains my explanation of my good faith belief that my first set of interrogatories (which I have used in other TTAB proceedings without objection) was proper, and that the objections of Applicant's counsel were simply an improper attempt to stonewall the interrogatories altogether. (This belief seems to be bolstered by the extent and ferocity by which counsel is opposing the present motion.) Because of a turn of events which I believe I had no reason to anticipate, I am left going into the testimony period with no answers to interrogatories.

5. Applicant's counsel appears to find fault with the fact that I have not attached the interrogatories which I propose to serve. However, there is no requirement for doing so, and the preparation of such interrogatories would be futile unless the discovery period is reopened. My first set of interrogatories, which was the subject of Opposer's motion to compel, is already on record with the TTAB, and I will be selecting the most important of those interrogatories from my standpoint to re-serve on Applicant's counsel, with an acute awareness of the need to keep the number (including anything that might possibly be viewed as a "subpart") under 75.

6. For reasons set forth in my prior motion to compel, I found it absurd that

Applicant's counsel counted 154 interrogatories, counting subparts, where I counted 68. I acknowledge that the TTAB counted more than 75 (though I am not sure how), and therefore denied my motion, but I have been in good faith throughout and submit that my difference of opinion with Applicant's counsel and the TTAB on the counting of interrogatories is indeed evidence of "excusable neglect" so as to justify the granting of my motion to reopen discovery.

7. Applicant's counsel submits argument and cites various citations as to why "follow-up discovery" should not be allowed. However, I am not seeking follow-up discovery. I am seeking merely an opportunity to have a slimmed-down version of my initial set of interrogatories answered. I am seeking basic answers to simple questions about Applicant's business which have not yet been answered.

8. Applicant's counsel has decorated his opposition with many pages of citations, but none of them is pertinent to the present facts.

9. Applicant's counsel complains about my failing to meet and confer in regard to reopening discovery. Indeed, upon receipt of the faxed copy of my motion on January 12, 2006, counsel called me and attempted to bully me into withdrawing the motion by asserting that there was a "meet and confer" prerequisite to such a motion, an assertion which I was unable to substantiate. Furthermore, I asked counsel on that occasion if he would stipulate to reopening discovery, and he stated

emphatically that he would not. Based on my dealings with counsel since the outset of this proceeding, it is clear that an attempt to seek his cooperation on almost anything is futile.

10. Applicant's counsel incorrectly attributes my "surprise" at the denial of my motion to compel on "failure to read and understand the procedural rules of discovery". On the contrary, I was well familiar with the TTAB rules on this subject, and specifically attempted to draft my interrogatories in such a way that they could not be found to be in excess of the 75-interrogatory maximum. There was no inadvertence or ignorance of the rules, but merely a good faith interpretation of the rules which turned out to be different from that of the TTAB.

11. Applicant's counsel claims that Applicant would be prejudiced by further delay of this proceeding, but this claim is disingenuous in light of counsel's own short-lived motion to compel discovery, filed herein on October 19, 2005, which was accompanied by a request for extension of the trial schedule (which was opposed by Opposer). Furthermore, the business issues complained of by Applicant and his counsel are not issues which will disappear simply because of the conclusion of the present proceeding. Opposer is interested in having this proceeding concluded at the earliest possible time, but believes that it is worthwhile to have some further delay in order to have an opportunity to get answers to Opposer's basic interrogatories. The

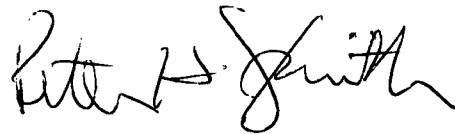
need for this basic discovery outweighs the need to stick to the present schedule.

12. As a footnote, Opposer notes that Applicant has used January 23, 2006, as the filing date for the present motion. In fact, Opposer mailed the motion on January 12, 2006, with an express mailing certificate, and therefore submits that January 12 should be deemed to be the filing date for the motion.

In closing, I note that Opposer is already in its testimony period, which is currently scheduled to end February 28, 2006. While I am presently preparing Opposer's testimony for filing, and will timely file it in any event, Opposer would appreciate it if the Board can act promptly on the present motion so that if the motion is granted, and the schedule extended, Opposer will have the opportunity to use the answers to its interrogatories as part of its testimony.

Dated: February 9, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter H. Smith", with a stylized flourish at the end.

PETER H. SMITH
Attorney for Opposer Gold Shells, Inc.
1535 J Street, Suite A
Modesto, CA 95354
(209) 579-9524

Certificate of Service

I hereby certify that a copy of the foregoing REPLY TO APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO REOPEN DISCOVERY PERIOD AND EXTEND TRIAL SCHEDULE was mailed first-class mail, postage prepaid, to Stephen L. Anderson, Esq., Anderson & Associates, 32605 Highway 79 South, Suite 208, Temecula, California 92592, attorney for Applicant, on February 9, 2006.

Dated: February 9, 2006.


LUGENE M. BORBA

CERTIFICATE OF EXPRESS MAILING
UNDER 37 CFR §2.198

Mark: MESSAGE IN A BOTTLE

Serial No.: 78/229,875

Opposition No. 91162780

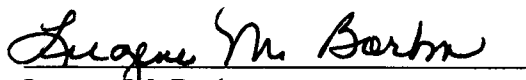
Name of party filing paper: Opposer Gold Shells, Inc.

Type of paper being filed: Reply to Applicant's Opposition to Opposer's Motion to Reopen Discovery Period and Extend Trial Schedule

Express Mail Mailing Label Number: EQ 041849410 US

Date of Deposit: February 9, 2006

I hereby certify that the above-identified Reply to Applicant's Opposition to Opposer's Motion to Reopen Discovery Period and Extend Trial Schedule, which is attached, is being deposited on February 9, 2006, with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR §2.198 in an envelope addressed to: U.S. Patent & Trademark Office, Trademark Trial & Appeal Board, P. O. Box 1451, Alexandria, VA 22313-1451.


Lugene M. Borba
Date: February 9, 2006